(28,258)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 315.

SOUTHERN PACIFIC COMPANY AND CALIFORNIA PACIFIC RAILROAD COMPANY, PETITIONERS,

vs.

OLYMPIAN DREDGING COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,630.

OLYMPIAN DREDGING COMPANY, a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Respondents.

Praecipe for Apostles on Appeal.

To the Honorable WALTER B. MALING, Clerk of the United States District Court for the Northern District of California:

Please prepare, authenticate and transmit to the United States Circuit Court of Appeals for the Ninth Circuit, for the appeal of Olympian Dredging Company, a corporation, from the decree filed and entered in the above-entitled cause on May 4, 1920, apostles on appeal, incorporating therein the following portions of the record, to wit:

1. Statement from Clerk required by Admiralty Rule 4, subdivision 1, section 1, of said Circuit Court of Appeals.
2. Libel.
3. Answer.
4. Decision of the Court.
5. Final decree.

6. All depositions taken before Commissioner.
7. All testimony taken in said cause.
8. Notice of appeal. [1*]
9. Assignment of errors.
10. Citation on appeal.
11. This praecipe.
12. Stipulation in re transmittal of original exhibits.
13. Order to transmit original exhibits and that the same need not be copied in the apostles.

The provisions of the Act of February 13, 1911, relative to the printing of the record are waived.

Dated: May 10, 1920.

J. S. SPILMAN,
HAVEN, ATHEARN, HALL & CHANDLER,
Proctors for Olympian Dredging Company, Appellant.

Copy of within praecipe received and due service of same acknowledged this 12th day of May, 1920.

FORD & JOHNSON,
Proctors for Respondents.

[Endorsed]: Filed May 13, 1920. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [2]

*Page-number appearing at foot of page of original certified Apostles on Appeal.

In the Southern Division of the District Court of the United States, for the Northern District of California, First Division.

No. 16,630.

OLYMPIAN DREDGING COMPANY, a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD CO., a Corporation,

Respondents.

Statement of Clerk U. S. District Court.

PARTIES:

Libelant: OLYMPIAN DREDGING COMPANY, a Corporation.

Respondents: SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation.

PROCTORS:

For Libelant: J. S. SPILMAN and HAVEN, ATHEARN, HALL & CHANDLER, Balboa Bldg., San Francisco, Cal.

For Respondents: Messrs. FORD & JOHNSON, Mills. Bldg., San Francisco, Calif. [3]

PROCEEDINGS.

1919.

June 18. Filed verified libel *in personam* for damages sustained by collision.

Issued citation for appearance of respondents, which was afterwards, on June 25th, 1919, returned with the following endorsement thereon: "I have served this writ personally, by copy on E. A. Van Wynen, Statutory Agent of the Southern Pacific and California Pacific Railroad Company at San Francisco, this 18th day of June, A. D. 1919.

J. B. HOLOHAN,
U. S. Marshal.
By C. G. Martin,
Deputy Marshal."

July 22. Filed answer of respondents.

December 2. This cause came on this day for hearing before the Honorable Frank H. Rudkin, District Judge. Ordered continued to December 3d, 1919, for further hearing.

December 3. Filed amendments to libel, leave of Court having been first obtained.

Further hearing was this day had, after which, the Court ordered that the case be referred to Ed Lehner as Special Master to take further testimony, and to take

and report the testimony and his conclusions and findings as to the amount of damage sustained.

1920.
January 28. This case was this day argued and submitted on the record and on briefs to be filed. [4]

1920.
January 28. Filed five volumes of testimony, taken before the Court and before the Special Master.

February 13. Filed opinion and order that a decree be entered dismissing the libel.

May 3. Filed decree.

13. Filed notice of appeal.
Filed assignment of errors.

17. Filed citation on appeal.
Filed cost bond on appeal. [5]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—(No. 16,630.)

OLYMPIAN DREDGING COMPANY, a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Respondents.

Libel in Personam for Collision.

To the Honorable M. T. DOOLING, Judge of the United States District Court, in and for the Southern Division of the Northern District of California:

The libel of Olympian Dredging Company, a Californian corporation, owner of the dredger "Thor," against Southern Pacific Company, a Kentuckian corporation, and California Pacific Railroad Company, a Californian corporation, in a cause of collision, civil and maritime, alleges as follows:

I.

That Olympian Dredging Company is, and ever since the seventh day of June, 1915, has been, a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business at the city and county of San Francisco, in said State, and is, and at all of said times was, the owner of the clam-shell dredger "Thor," and engaged in business as a dredging contractor. [6]

II.

That Southern Pacific Company is, and at all of the times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky, with its principal place of business at Anchorage, in said State, and is, and at all of said times was, engaged in business in the State of California, in managing,

conducting and operating railways and railway systems.

III.

That California Pacific Railroad Company is, and at all of the times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business at the city of San Francisco, in said State, and is, and at all of said times was, engaged in business as the owner of a railway and a railway system in the State of California.

IV.

That at all the times hereinafter mentioned the Southern Pacific Company was the lessee of the California Pacific Railroad Company, and as such lessee did control and manage the business of California Pacific Railroad Company.

V.

That in the year 1895 there was a bridge across the Sacramento River, one end of which was situated at a point on the bank of said river near the foot of G Street, in the city of Sacramento, State of California, and the other end of which was situated at a point on the bank of said river in the town of Washington, county of Yolo, State of California; that said bridge was supported by piles driven into the bed of the Sacramento River; that said bridge was owned by the said California Pacific Railroad Company and was used by the respondents as a railroad bridge; that said bridge was also used by the inhabitants of Sacramento and

Yolo counties and by the public generally in crossing *the crossing* the Sacramento River between Sacramento [7] and Yolo counties in vehicles and on foot.

VI.

That in the said year 1895 the respondents constructed a new bridge across said river at a point approximately four hundred feet below said old bridge; and that at or about the time of the completion of said new bridge in the said year 1895 respondents demolished and removed said old bridge first herein mentioned.

VII.

That in demolishing and removing said old bridge first herein mentioned the respondents negligently failed to remove the piles which had been driven into the bed of the Sacramento River as supports for said bridge; but, on the contrary, said respondents sawed or cut said piles below the surface of the water in said river and left the stumps of said piles firmly fixed in the bed of said river, and said stumps remained in that condition during all of the time intervening between the sawing or cutting of said piles and the time of the collision hereinafter alleged.

VIII.

That the dredger "Thor" is a floating clamshell dredger, having a hull fifty-six feet beam, one hundred and twenty feet long, eleven feet six inches depth of side, boom one hundred sixty feet in length.

IX.

That on the 13th day of July, 1918, the libelant was engaged in dredging with said dredger "Thor" in the Sacramento River above the city of Sacramento, under a contract between Major (now Colonel) L. H. Rand, Corps of Engineers, United States Army, as contracting officer, and the libelant. That under said contract the libelant was required to operate said dredger under the general directions of the contracting officer in the Sacramento and other rivers in the State of California. [8]

X.

That on said 13th day of July, 1918, the libelant, acting under the orders and directions of the contracting officer, proceeded to move said dredger "Thor" down the Sacramento River from the point at which said dredger was then working to a point on said river below the point at which said stumps of piles had been left by respondent, as hereinbefore alleged.

XI.

That in the course of the movement of said dredger down said river the said dredger collided with the said stumps of piles, and said stumps of piles punctured the hull of said dredger, and said dredger sank in said Sacramento River, and the hull and machinery of said dredger were damaged to the amount of $18,493.72.

XII.

That at the time of said collision the said stumps of piles were submerged and invisible and were an

unlawful obstruction and menace to navigation; and said collision occurred without fault on the part of the libelant.

XIII.

That by reason of the injuries suffered by said dredger "Thor" as the result of said collision with said piles the libelant was obliged to and did expend for raising and repairing said dredger the sum of $4,495.94; for towing said dredger to the drydock in San Francisco Bay, $702.98; for drydock charges, $8,260.00; for towing said dredger from drydock to its place of work for the United States Government, $270.00; and the libelant sustained further damage for the loss of earnings of said dredger from the time of said collision until said dredger was repaired and resumed operations, in the sum of $4,764.40; making the total damage suffered by plaintiff by reason of said collision and the resultant injuries to said dredger and the sinking thereof the sum of $18,493.72 as aforesaid, and no part of said sum has been paid to the libelant by the respondents or either of them. [9]

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

WHEREFORE, libelant prays that a monition in due form of law, according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against the said Southern Pacific Company and the said California Pacific Railroad Company, and that they, and each of them, may be cited to appear and answer all and

singular the matters aforesaid, and that this Honorable Court may be pleased to decree to the libelant the amount of its damages and costs, and that the libelant may have such other and further relief as in law and justice it may be entitled to receive.

OLYMPIAN DREDGING COMPANY,
By WM. E. PALMER,
President.

JAMES S. SPILMAN,
HAVEN & ATHEARN,
Proctors for Libelant. [10]

The United States of America,
Northern District of California,—ss.

On this 18th day of April, 1919, before me, at the city and county of San Francisco, State of California, in the Northern District of California, appeared William E. Palmer, the President of Olympian Dredging Company, a corporation, the libelant named in the within and foregoing libel, and made oath that he had read the foregoing libel by him subscribed, and knows the contents thereof; that he is authorized to verify said libel on behalf of said corporation; that the same is true of his own knowledge, except as to those matters therein stated to be on information and belief, and as to those matters that he believes it to be true.

WM. E. PALMER.

Subscribed and sworn to before me, this 18th day of April, 1919.

[Seal] N. E. W. SMITH,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jun. 18, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [11]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. (16,630.)

OLYMPIAN DREDGING COMPANY, a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Respondents.

Answer of Respondents.

Come now the respondents named in the libel on file herein, and by way of answer to said cause of action, both civil and maritime, therein attempted to be set forth, deny, admit, aver and allege as follows, to wit:

Aver that they have no information or belief sufficient to enable them to answer the allegations contained in paragraph I of said libel, and basing their denial upon this ground, deny each and every, all and singular, the allegations contained therein, and each and every part thereof.

Admit the allegations contained in paragraph II of said libel.

Admit the allegations contained in paragraph III of said libel.

Admit the allegations contained in paragraph IV of said libel.

Admit that in about the year 1895 there was a bridge across the Sacramento River, one end of which was situated at a point on the bank of said river near and in the general vicinity of G Street in the city of Sacramento, State of California, and that the other end of said bridge was situated [12] at a point on the bank of said river in the township of Washington, county of Yolo, State of California.

Admit that said bridge was supported by piles driven into the bed of the Sacramento River.

Deny that said bridge was owned or controlled in the year 1895 or at any other time or at all by the said California Pacific Railroad Company, and deny that said bridge was used by the respondents or either of them as a railroad bridge, or that said bridge was used by the respondents at all.

Deny that in the said year 1895 the respondents, or either of them, constructed a new bridge across said river at a point approximately four hundred feet below said old bridge, and deny that at or about the time of the completion of said new bridge or at any other time or at all, or in the said year 1895, respondents demolished or removed said old bridge referred to in paragraph V of the libel on file herein.

Deny that respondents demolished or removed any bridge upon the piling of which the dredger

"Thor" collided, or that there was any duty or obligation upon the part of these respondents or either of them to remove the piling of any bridge upon which said dredger was damaged.

Deny that in demolishing or removing said old or any bridge first mentioned in said libel, the respondents or either of them negligently or at all failed to remove the or any piles which had been driven in the bed of the Sacramento River as supports for said bridge or had been driven into the bed of the Sacramento River at all.

Deny that said respondents, or either one of them, sawed or cut off said or any piles below the surface of the water in said river, or left the or any stumps of said or any piles firmly or at all fixed in the bed of said river, and deny that said or any stumps remain*d*ed in that or any condition during all or any of the time intervening between the sawing or cutting of said or any piles and the time of the collision referred to in said libel. [13]

Aver that they have not sufficient information or belief to enable them or either *of* one of them to answer the allegations contained in paragraphs VIII, IX and X of the libel herein, and basing their denials thereof upon this ground, deny each and every, all and singular the allegations contained therein, and each and every part thereof.

Deny that the said dredger "Thor" was caused to be moved or proceeded to move under the orders or direction of the or any contracting officer or any other person at all on the 13th day of July, 1918, or at any other time or at all, from a point

below any stumps of piles left in the said river bed by the respondents, or either one of them.

Deny that the respondents, or either one of them, negligently or carelessly or at all, or at any time or at all left the or any stumps of piles or stumps of any kind in the bed of the Sacramento River at any point near which said dredger "Thor" was being operated.

Deny that in the course of the or any movement of said or any dredger down said river, the said or any dredger collided with the said or any stumps of piles, or any piles, or stumps of piles allowed to remain below the surface of the river at any time by these respondents, or either one of them, And deny that said or any stumps of piles punctured the or any hull of said or any dredger, and deny that by reason thereof said or any dredger was damaged to the amount of $18,493.72, or in any other sum, or at all.

Deny that at the or any time referred to in said libel, or at the time of said collision that any stumps of piles were negligently or carelessly or at all permitted to remain in the bed of the said river by the said respondents, or any piles which the respondents, or either one of them, had negligently or carelessly or at all failed to remove, were submerged or invisible or were an unlawful obstruction or obstruction at all or a menace to navigation. Deny that said collision occurred [14] without fault upon the part of the libelant.

Deny that as a result of said collision of the said dredger "Thor" with said piles, the libelant was

obliged and did expend for raising or repairing said dredger the or any sums of money mentioned in the libel herein, and further deny that by reason of said collision as alleged in said libel and the resultant injuries to the said dredger and the sinking thereof, the libelant suffered damage for the loss of earnings of said dredger until the same was repaired in any sum whatever, and deny that by reason of the or any collision of said dredger "Thor" with any piles or stumps of piles left in the bed of the said Sacramento River at the or any time whatever by the respondents, the said dredger was damaged at all or that the libelant suffered damage thereby, either for the raising or repairing of said dredger or for towing said dredger to drydock, or for drydock charges, or for towing said dredger from drydock to its place of work, or through the loss of earnings of said dredger. That all and singular the allegations of the answer are true.

WHEREFORE, respondents pray that the libelant take nothing by its libel, and that said libel may be dismissed and respondents awarded their costs.

GEO. K. FORD,
Proctor for Respondents. [15]

State of California,
City and County of San Francisco,—ss.

G. L. King, being first duly sworn, deposes and says: That he is an officer, to wit, assistant secretary, of the Southern Pacific Company, a corporation, one of the respondents in the above-entitled action; that he has read the foregoing answer and

knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true.

G. L. KING.

Subscribed and sworn to before me, this 22d day of July, 1919.

[Seal] FRANK HARVEY,

Notary Public, in and for the City and County of San Francisco, State of California.

Receipt of copy of the within answer is hereby admitted this 22d day of July, 1919.

JAMES T. SPILMAN,
HAVEN & ATHTEARN,
Attorneys for Plaintiff.

[Endorsed]: Filed Jul. 22, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [16]

At a stated term of the District Court of the United States for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Tuesday the 2d day of December, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable FRANK H. RUDKIN, District Judge.

No. 16,630.

OLYMPIAN DREDGING CO., etc.,

vs.

SOUTHERN PACIFIC CO. etc. et al.

Minutes of Court—December 2, 1919—Hearing.

This cause came on regularly this day for hearing of the issues joined herein. Frank Hall, Esq., was present as proctor for libelant. Elliott Johnson, Esq., was present as proctor for respondents. Mr. Hall made statement to the Court as to the nature of cause. On motion of *Mr. Elliott,* and hour of adjournment having arrived, the Court ordered that the further hearing of this cause be continued to December 3, 1919, at 10 o'clock A. M. [17]

At a stated term of the District Court of the United States for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Wednesday, the 3d day of December, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable FRANK H. RUDKIN, District Judge.

No. 16,630.

OLYMPIAN DREDGING CO. etc.

vs.

SOUTHERN PACIFIC CO. etc. et al.

Minutes of Court—December 3, 1919—Hearing (Continued).

This cause came on regularly this day for further hearing of the issues joined herein. Frank

Hall, Esq., was present as proctor for libelant. Geo. K. Ford, Esq., was present as proctor for respondent. On motion of Mr. Hall, the Court ordered that libelant be and is hereby granted leave to file an amendment to its libel heretofore filed herein. Mr. Hall called J. C. Boyd, A. A. McKeen, M. H. Comstock, George Dickson, Charles R. Hall, J. Kagee, Henry Fuse, J. A. Johnson and C. Deck, each of whom was duly sworn and examined on behalf of libelant, and introduced in evidence certain exhibits which were filed and marked Libelant's Exhibits 1 (maps), 3, 4, 5, 6, 7 (photos), 8 (11 photos), 9, 10 (blue-prints), and filed for Identification Libelant's Exhibit 2A and B (maps). After hearing proctors for the respective parties, the Court ordered that this cause be referred to Ed. Lehner as Special Master to take and report the further testimony offered herein, and to further take and report the testimony together with his conclusions and findings as to the amount of damages due herein if the Court should so determine. During the progress of this cause Mr. Ford introduced in evidence a certain report (Weather Bureau), which was filed and marked Respondent's Exhibit "A." [18]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,630.

OLYMPIAN DREDGING COMPANY, a Corporation.

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Respondents.

Amendments to the Libel in Personam.

To the Honorable M. T. DOOLING, Judge of the United States District Court, in and for the Southern Division of the Northern District of California:

Comes now the above-named libelant, leave of Court being first had and obtained, and amends its libel as follows, to wit:

I.

By striking out all of paragraph XIII, and substituting in lieu thereof, the following, to wit:

XIII.

That by reason of the injuries suffered by said dredger "Thor" as the result of said collision with said piles the libelant was obliged to and did expend for raising and repairing, necessary to the raising of said dredger, the

sum of Six Thousand Four Hundred and Seventeen and 84/100 ($6,417.84) Dollars; for towing said dredger to the drydock in San Francisco Bay, Seven Hundred and Two and 98/100 ($702.98) Dollars; for drydock charges, and repairs of said dredger while in said drydock, Six Thousand Two Hundred and Sixty ($6,260.00) Dollars; for towing [19] said dredger from drydock to its place of work for the United States Government, Two Hundred and Seventy ($270.00) Dollars; and the libelant sustained further damage on account of the loss of earnings of said dredger from the time of said collision until said dredger was repaired and could resume operations, in the sum of Five Thousand Six Hundred and Thirty-nine and 71/100 ($5,639.71) Dollars; making the total damage suffered by libelant by reason of said collision and the resultant injuries to said dredger and the sinking thereof, the sum of Nineteen Thousand Two Hundred and Ninety and 53/100 ($19,290.53) Dollars as aforesaid, and no part of said sum has been paid to the libelant by the respondents or either of them.

II.

Libelant further amends its said libel by inserting after the word "costs" in the prayer in line nineteen (19) of the last paragraph of said libel *in*

personam, the words "and interest."

OLYMPIAN DREDGING COMPANY,
By WM. E. PALMER,
President.

J. S. SPILMAN,
HAVEN, ATHEARN, HALL & CHANDLER,
Proctors for Libelant. [20]

The United States of America,
Northern District of California,—ss.

On this 1st day of December, 1919, before me, at the city and county of San Francisco, State of California, in the Northern District of California, appeared William E. Palmer, the president of Olympian Dredging Company, a corporation, the libelant named in the within and foregoing amendments to the libel, and made oath that he had read the foregoing amendments to the libel by him subscribed, and knows the contents thereof; that he is authorized to verify said amendments to the libel on behalf of said corporation; that the same are true of his own knowledge, except as to those matters therein stated to be on information and belief, and as to those matters that he believes it to be true.

WM. E. PALMER.

Subscribed and sworn to before me this 1st day of December, 1919.

[Seal] ALICE SPENCER,
Notary Public in and for the City and County of San Francisco, State of California. [21]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,630.

OLYMPIAN DREDGING COMPANY, a Corpotion,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Respondents.

Notice of Motion for Leave to Amend Libel.

To the Above-named Respondents and Their Proctor, George K. Ford:

You and each of you are hereby notified that on Tuesday, December 2, at ten (10) A. M., the above-named libelant will make application to Honorable Frank H. Rudkin, Judge of said court, for permission to file the attached amendments to its libel in the above-entitled cause.

Dated: December 1, 1919.

J. S. SPILMAN,
HAVEN, ATHEARN, HALL & CHANDLER,

Proctors for Libelant.

Service of the within by copy is hereby admitted this first day of December, A. D. 1919.

GEO. K. FORD, and
ELLIOTT JOHNSON,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 3, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [22]

In the District Court of the United States, in and for the Southern Division of the Northern District of California, First Division.

Before Hon. FRANK H. RUDKIN, Judge.

No. 16,630.

OLYMPIAN DREDGING COMPANY, a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Respondents.

Testimony Taken in Open Court.

Tuesday, December 2, 1919.

Counsel Appearing:

For the Plaintiff:

FRANK HALL, Esq., THOMAS E. HAVEN, Esq., and JAMES F. SPILLMAN, Esq.

For the Defendant:

ELLIS JOHNSON, Esq.

Mr. HALL.—May it please your Honor, this is a libel *in personam* brought by the Olympian Dredging Company, a California corporation, against the Southern Pacific Company and the California Pacific Railroad Company, for damages resulting to the dredger "Thor" by reason of the collision of the dredge with certain piles in the Sacramento River.

The testimony on behalf of the Libelant will be that prior to July, 1918, in fact about the year 1878, the Southern Pacific Company and the California Pacific Railroad Company erected a railroad bridge near the city of Sacramento, extending from the foot of Broad Street, in Sacramento, to the foot of [23] Ann Street, in the town of Washington, in the County of Yolo, on the other side of the river. That bridge was used both by the Southern Pacific and maintained by the California Pacific until 1895, when application was made to the War Department for permission to erect the new bridge. The new bridge was erected further down the stream and was erected for the same purpose, namely, for the use of the railroad trains of those two defendants. The 1878 bridge was to be destroyed. Before the permit was granted by the War Department for the erection of the new bridge, the ordinary application, as required by the War Department, was made. Before the permit was granted, or as condition precedent to the erection of the new 1895 bridge, the War Department required that the two defendants, or, rather, the California Pacific Railroad Company should remove

the old 1878 bridge and remove the piles and free the river to navigation, so that there would be no obstruction to crafts passing up and down the stream.

The bridge was erected, and the final removal was completed in February, 1896, after the completion of the new bridge further downstream. However, the piles of the 1878 bridge were not entirely removal from the bed of the stream. As your Honor will learn from the witnesses, the channel of the stream which was used by craft in navigation changed from time to time; it drifted from the Yolo County side over toward the Sacramento side, and some of these piles in this old bridge which were left in the river at the time of the destruction of the 1878 bridge remained there until in July, 1918, when the dredger "Thor," which is owned by the Olympian Dredging Company, was engaged in dredging for the Government some place north of the bridge, the present bridge, and upstream from [24] the present bridge, and upstream from the site of the 1878 bridge; and on the afternoon of July 13, 1918, the Government engineers directed the captain of the "Thor" to move her down below the site of the old 1878 bridge and the site of the present railroad bridge, to do dredging for the city of Sacramento, in some matters relating there to the water supply of the city.

The captain of the "Thor" started to float the dredger downstream with the bow to the rear, and with the stern of the dredger to the front. This is the customary and ordinary way of moving a

dredger of that sort. The "Thor" was a clamshell dredger, 120 feet long, 58 feet wide, the hull was about 10 feet deep, and she had a draft of about 5 feet when in the water. The reason for dropping the "Thor," or any dredger of this type downstream in the manner that these men did drop her downstream that night is that there is a long arm or boom which stands out from the bow of the boat when she is in operation as a dredger, and attached to that by iron cables is the clamshell dredger or instrument which *does* down into the bottom of the stream and brings up the earth. In moving a boat of that sort, she has no propeller, she has no rudder, they guide her by swinging this long boom, which was, on the "Thor," I believe, something over 100 feet long, with these heavy iron buckets suspended on the end of the arm—they guide the craft downstream by shifting the boom from side to side; so that we expect to show that in taking the "Thor" downstream that night to do this emergency work under the direction of the Government engineers, she would be navigated downstream in the usual safe and ordinary manner.

There is across the Sacramento River at the present time a bridge constructed by these defendants and operated by these [25] defendants, as a railroad bridge; that was constructed there in 1910. It is a drawbridge, and, in order for a craft such as the "Thor" to pass downstream, it is necessary to open the drawbridge.

The COURT.—The companies maintain two bridges there now?

Mr. HALL.—No, there is only one bridge there. The 1895 bridge was taken out also; when the present bridge, which we will call the 1910 bridge, was erected, the 1895 bridge was destroyed. The 1910 bridge, which is the present bridge, is situated about 100 feet, maybe more or less, downstream from the site of the old 1878 bridge. The 1895 bridge, which is also destroyed, was downstream some 400 or 500 feet from the site of the present bridge, and about 100 feet or less from the site of the 1878 bridge.

When Captain Kegge, who was in charge of the dredger on the night of July 13, 1918, came to the bridge, he dropped his bucket and called for the opening of the draw. The draw was opened, and when he started to go downstream the "Thor" stuck or struck something in the bed of the stream. The leverman who was on the bridge, or in charge of the immediate navigation of the craft, swung his boom from side to side, or swung it over to the opposite side, in order to dislodge the "Thor" from the obstruction upon which she had landed; that failed to move her, and immediately after that, when they found that the "Thor" was lodged fast upon some obstruction, the captain ascertained that she had been punctured through the bottom of the hull, and she did not move from that position, but immediately went down and filled with water. The men drew the fires from the boiler, made her as safe as possible, so that there would be no explosion or no injury further than necessary to the machinery and the hull, and she immediately filled

[26] with some 5 or 6 feet of water. Of course, the hull being full of water, men could not go down in there and ascertain what the condition was. They telegraphed to San Francisco for divers, and on the following night a diver by the name of Fuse arrived, and the next morning Mr. Fuse put on his diving suit and went down and made an examination of the boat.

The COURT.—My impression at the present time is I should not go into the question of damages.

Mr. HALL.—I was just giving the details of that, but I will not go into that further than to say that the divers found that her bottom was punctured in some five or six different places by groups of piles, which were evidently piles of a bridge.

After the divers came there they found from their examination, as I have said, her bottom was punctured by a group of piles in one place and in other places by single piles. The divers will, we think and believe, show your Honor conslusively that these piles which went through the bottom of the "Thor" were piles that had been supposedly used in the construction and maintenance of this particular bridge of 1878. I need not detail the entire transaction, but it will suffice to say that the "Thor" remained in that position, and it took them some time to float her, so that she could be towed to the drydock; she was afterwards towed to the drydock and repaired, and your Honor, I assume, is not interested in that at this time, but we have the men here who were in charge of the operation of the dredge at the time she was float-

ing downstream, the divers who sawed off this piling after she was hung up on them, and the men who conducted the operations which eventually led to her repair.

Now, I want to go back just a little bit and possibly [27] anticipate the defense which may be made to the libelant's cause of action, namely, that the piles in question upon which the "Thor" was wrecked were not the piles of any bridge constructed and maintained by these defendants. That takes us back to ancient history of California. The first bridge which was erected across the Sacramento River was erected in 1858, under an order of the Board of County Commissioners of Sacramento County, which granted permission to the Sacramento & Yolo Bridge Company to erect and maintain a wagon bridge across the stream at Sacramento. That bridge was erected by men, I think one of the men's name was Price, and the other was Geiger, and the third man's name I have forgotten, and was maintained until the California Pacific commenced the operation of its railroad from Vallejo Junction up through Davis and into the city of Sacramento along the line of the present Southern Pacific Railroad Company.

At that time, the State legislature, in 1867, granted to the California Pacific Railroad Company the rights which had theretofore been granted to the Marysville & Sacramento Railroad Company, to erect and maintain a bridge across the river at that place. It seems that instead of erecting a new bridge, the California Pacific took over

the old Sacramento & Yolo County bridge, and made it into a railroad bridge. That bridge was operated and maintained by the Southern Pacific Company and the California Pacific Company from 1869 down to the construction of the 1878 bridge in that year. So that we then have the history of four bridges across the stream at Sacramento. First, the 1858 bridge, which was originally a wagon road bridge, afterwards in the '60's converted into a railroad bridge and used by the California Pacific Railroad Company; then the 1878 bridge, which was constructed by the [28] California Pacific Railroad Company, in 1878—and I might digress a moment to say that the 1878 bridge was erected just a few feet, probably 25 or 30 feet upstream from the site of the 1869 wagon road bridge, or the 1858 wagon road bridge, or 1869 railroad bridge. Then that 1878 bridge was maintained and operated by these two respondents from 1878 until in February, 1895, when the 1895 bridge was built from a point about 400 feet downstream, running diagonally across to the river front in Sacramento; then that bridge was maintained by these two respondents until 1910, when the present bridge was built nearer the site of the old bridge than was the 1895 bridge.

I give your Honor this history, because there will be a number of bridges mentioned, and it may be somewhat difficult—

The COURT.—Which bridge is involved in the injury?

Mr. HALL.—The 1878 bridge, the bridge that was commenced to be erected in 1878, under an act of

the legislature of the State of California, and which was required to be destroyed and removed from navigation by the secretary's order of 1895 permitting the erection of the 1895 bridge.

When we have shown these things, we shall ask your Honor to refer the matter to a Commissioner to take up the question of damages and prove the amount of our damage.

My co-counsel calls attention to one fact that I overlooked, that these piles upon which the "Thor" was wrecked, were not standing up out of the water, but were submerged, and were absolutely unknown—it was an unknown menace, that was not known to navigation there, and especially to the captain and the leverman, who were in charge of the "Thor" the night she was taken downstream; so that there was nothing there, there was no negligence on their part, and no knowledge on [29] their part of this hidden, concealed menace to navigation.

The COURT.—We will suspend now until to-morrow morning.

(An adjournment was here taken until to-morrow, Wednesday, December 3, 1919, at ten o'clock A. M.)

[Endorsed]: Filed Jan. 28, 1920. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [30]

In the District Court of the United States, for the Southern Division of the Northern District of California.

Before Hon FRANK H. RUDKIN, Judge.

No. 16,630.

OLYMPIAN DREDGING COMPANY, a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Respondents.

Testimony Taken in Open Court.

Wednesday, December 3, 1919.

Counsel Appearing:

For the Plaintiff:

FRANK HALL, Esq., THOMAS E. HAVEN, Esq., and JAMES F. SPILLMAN, Esq.

For the Defendant:

GEORGE FORD, Esq.

ELLIOT JOHNSON, Esq.

Mr. HALL.—Several days ago I served upon the counsel for the respondents some amendments to my libel in this case. They only affect the question as to the amount of the damages; some of the

figures were incorrect. Mr. Ford, there is in the copy that you had set out as the loss of time the sum of $5,639.74. The bookkeeper or accountant for the Dredging Company upon correcting his figures finds that it is $5,323.49.

Mr. FORD.—That is in my favor, so I have no objection to it. [31]

Mr. HALL.—May I ask the clerk to amend that on the face of it or amend it before we file it.

The COURT.—Very well.

Mr. HALL.—We also served upon counsel for the respondents some days ago a notice to produce and have present at the hearing certain documents, and I wish now to ask the Court for an order requiring the defendants to produce these documents for the use of the libelant.

Mr. FORD.—If your Honor please, all of the records of the Southern Pacific Company practically were burned in 1906, and in some cases we will be able to produce copies and probably in some cases not. I find in checking through there are four documents demanded that I never heard of, and so far as I have been able to find nobody in the Southern Pacific Company, or any of its subsidiary concerns knows anything about them. Evidently Mr. Hall has some information about these which he may refer us to which may enable us to locate them.

Mr. HALL.—I have some history of those, it is rather vague and indefinite, but it may be if they are unable to produce them some secondary evidence may become competent, so I would like the

order of the Court to produce them, or I will take counsel's answer to the demands.

Mr. FORD.—For instance, one, the lease or agreement between the Southern Pacific Company and California Pacific Railroad Company, I cannot produce the original, but will produce copies which no doubt will answer the purpose just as well and you can check them up and see whether they correspond*ent* with the facts.

Mr. HALL.—That is all right. [32]

Mr. FORD.—Now, in the notice, Nos. 2, 3, 4 and 5, concerning certain conveyances, I never heard of them, and I don't know that anybody ever heard of them except Mr. Hall.

The COURT.—Is there any record of them any place?

Mr. FORD.—There may be a record of them, but this notice was served on me only Thursday and I was unable personally to devote any time to looking for them, as I was engaged in the trial of a case which lasted last night until about seven o'clock.

Mr. HALL.—Might I explain that I came by it this way, that the tax records of Sacramento County show the old 1859 bridge was taxed to the Sacramento and Yolo County Bridge Company until the year 1878, and then at that time I think the testimony will show that the bridge was in use by the respondents, so I assumed there was some sort of a transfer.

Mr. FORD.—There will not be much dispute on

that question, but I do not think you will find any transfer.

Mr. HALL.—I do not know whether there was a formal transfer or not. If there was I desire to have it.

Mr. FORD.—As to No. 6, all agreements and leases between the California Pacific Railroad Company and the Southern Pacific Company affecting or in any wise granting to the Southern Pacific Company the right to build, repair, maintain or use any bridge or bridges across the Sacramento River at or near the City of Sacramento, I think the copy which I will produce under the first subdivision will answer that.

Mr. HALL.—All right.

Mr. FORD.—The 7th, all leases and agreements between the Central Pacific Railroad Company and the Southern Pacific Company affecting or in any wise granting to the Southern Pacific Company, the right to build, repair, maintain or use any bridge or bridges across the Sacramento River at or near the City of Sacramento, I am satisfied that that will not affect the situation here because the lease from the California [33] Pacific covers the matter fully, and while there was a previous lease between the Ceneral Pacific and the California Pacific, it was cancelled by an agreement which obliterates that matter.

No. 8, the contract between the California Pacific Railroad and W. H. Martin & Company of San Francisco, dated the —— day of ——, 1869, for the construction or reconstruction of a bridge across the

Sacramento River at or near the city of Sacramento, Sacramento County, California, that is something we know nothing of, but probably if there is such a document I will be able to produce it; they are making search for it now.

Mr. HALL.—I do not believe that you will be able to find that. I know there was such a contract in existence; I tried to trace it down myself; if you have a copy in your own files I wish you would produce it.

Mr. FORD.—So far as I am informed at the present time all the records practically of the Southern Pacific Company were burned here at the time of the fire, but we will be able to produce some copies.

Mr. HALL.—May I file this motion of notice to produce then?

The COURT.—Yes.

Mr. HALL.—I will accept counsel's answer and take such documents as he produces.

Testimony of James C. Boyd, for Libelant.

JAMES C. BOYD, called for the libelant, sworn.

Mr. FORD.—Now, I understand, Mr. Hall, and if your Honor please, so far as these documents as to which a demand has been made to produce and concerning which we have no information, we do not want to enter into any stipulation unless there is some showing, because going back of 1869, I have not any knowledge.

Mr. HALL.—I will take counsel's answer.

Q. What is your name? A. James C. Boyd.

[34]

(Testimony of James C. Boyd.)

Mr. HALL.—I now submit to counsel a certified copy of the records of the War Department of the United States showing the permits issued by the Secretary of War to the California Pacific Railroad Company for the construction of the bridge known as the 1895 bridge and requirement of the destruction of the 1878 bridge, together with the plats and plans attached thereto.

Mr. FORD.—Not having an opportunity to examine these, or knowing anything about either of them, I want to make the objection that they are immaterial, irrelevant and incompetent, and not the best evidence. I take it that the evidence of the destruction should come from some other source.

The COURT.—It is the directions they gave in regard to it?

Mr. HALL.—It is a condition precedent to the granting of the permit for the erection of the 1895 bridge, that the 1878 bridge shall be destroyed.

The COURT.—I will admit it for the purpose of making up the record.

(The document was here marked Libelant's Exhibit 1.)

Mr. FORD.—May I inquire who this permit was issued to?

Mr. HALL.—It was issued to the California Pacific, one of the respondents. I want to read this certificate to your Honor first, so that your Honor will clearly have it in mind.

Mr. FORD.—Your Honor will understand that I have made no investigation concerning that matter

(Testimony of James C. Boyd.)

because I assumed that regardless of the permit it would be our duty to destroy a bridge if we discontinued the use of it.

Mr. HALL.—I want to show by this there was a responsibility cast upon them—

The COURT.—With that concession I do not see the necessity of reading the certificate.

Mr. HALL.—I do not either. [35]

Q. Your name is J. C. Boyd? A. Yes.

Q. What is your occupation? A. Civil engineer.

Q. Where do you reside? A. Sacramento.

Q. How long have you been engaged in engineering? A. Thirty-seven or thirty-eight years.

Q. And most of that time in the city of Sacramento? A. Throughout the valley.

Q. Are you familiar with the river at Sacramento?

A. I am.

Q. How long have you lived there?

A. Over thirty years.

Q. Have you recently made any maps or sketches of the river at Sacramento? A. I have.

Q. And particularly with reference to the bridges which have been erected across that? A. I have.

Q. Will you produce that sketch or plat?

A. Yes.

Mr. HALL.—This may seem unnecessary detail, but the question is going to come up as to what particular piles the vessel was wrecked on.

A. The maps on the blackboard, the upper one—

Mr. HALL.—Let us have the clerk mark these as Libelant's Exhibit 2 and 3.

Mr. FORD.—Before we put them in evidence—

Mr. HALL.—May we have them marked so that I can refer to them as exhibit so-and-so, and then I will make my offer after that when they have been proven.

The COURT.—Yes.

(The documents were marked Libelant's 2A and 2B.)

A. The upper drawing on the board in blue-print form and entitled "Map showing location of railroad and highway bridges over Sacramento River at Sacramento" is the result of a survey made by me during the year 1919, the latter part of the summer, for the purpose of locating the existing bridge, the existing protection pier, the piles which are in evidence in the bed of the stream and immediately adjacent thereto, and on the [36] upstream side of the existing bridge; on the right-hand side the end of the bridge is marked East End and the west the West End; that is of the existing railroad and highway bridge over the Sacramento River; the protection pier is shown and so marked here and the draw-span is on either side of that protection pier; in this draw-span, in either channel, during the middle stages of the river, either channel can be used and has been used and is used by water craft in the river; especially they use this easterly channel, from the main central pier; the piles are shown in small circles, some of them in cluster form, others in scattered form, in evidence now on the bank or shore line of the Sacramento side; on the left is a figure showing the protection pier of an abandoned bridge, and on the lower side of that is the United States Government wing

(Testimony of James C. Boyd.)

dam extending from the neighborhood of that pier toward the middle of the stream, at the end of which there is in evidence here six clusters of piles constructed in a similar form as the pier which I have mentioned on the left side; to the left of this map, on the upper left-hand corner, this same pier is projected in detail form, and on an enlarged scale showing the size of the members which go to make up that pier, and on the right-hand upper corner is a diagram showing a section A-A across the six piles which are on the Sacramento shore. These are the bridge head of the eastern end of the old bridge.

The COURT.—Which bridge do you refer to now.

Mr. HALL.—That is the 1878 bridge.

A. The '78 bridge.

Q. Mr. Boyd, in locating the bridge which you have depicted upon Exhibit "A," did you refer to the certified copies of the papers and plans which were furnished you from the War Department?

A. I had them before me.

Mr. FORD.—You mean these here in evidence?

Mr. HALL.—Yes; these in evidence. [37]

Q. Does the plan of the bridge, the 1878 bridge, which you have here depicted conform to the plat and plans furnished by the War Department?

A. The general location; yes.

Q. Now, commencing at the west or Yolo side of the river, I note here the pier which you have described; then a little further towards the eastern bank of the river on the Sacramento side I notice a cluster of piles; how did you get the distance between the pier head and the cluster of piles?

(Testimony of James C. Boyd.)

A. With a steel tape.

Q. With a steel tape? A. Yes.

Q. That is marked as 143 feet? A. Yes.

Q. Then just near the protection dam of the present drawbridge or protection work of the present drawbridge I notice that you have depicted three clusters of piles. How did you get those?

A. In a similar manner.

Q. In the Sacramento side you have a rectangular figure in which the word "Thor" is printed, on the upstream end of that I notice a dotted line drawn from the bow of the "Thor" to this protection of the drawbridge, and in the center of that protection line are the figures 63, with the foot-mark after it. How did you get that measurement?

A. From the United States Government plat filed in the United States Engineer's Office at Sacramento.

Mr. FORD.—I do not understand that at all.

Mr. HALL.—Q. Do you know whether or not there was a survey made by the United States Engineers' Department at the time the "Thor" was upon the piles, when she was wrecked?

Mr. FORD.—Objected to upon the ground it is hearsay.

Mr. HALL.—By an examination of a public record.

Mr. FORD.—The same objection.

The COURT.—The public record would be the best evidence. [38]

Mr. HALL.—Yes, if they object to that. I am not offering that as substantive evidence but merely as illustrating the plat.

(Testimony of James C. Boyd.)

Mr. FORD.—I don't want to appear to be technical, but I think it is perfectly proper the best evidence should be produced where it can be.

Mr. HALL.—I think we can produce that evidence.

Mr. FORD.—No doubt.

Mr. HALL.—May I, for the purpose of illustrating the plat and describing it, have him tell about it?

Mr. FORD.—Certainly.

Mr. HALL.—At the downstream or stern end of the "Thor" I notice you have a similar dotted line running from the point of the boat to the protection work, and the figures 110; where did you get those figures from? A. From the same document.

Q. Within the rectangle which you have marked the "Thor" I notice a number of piles indicated. Where did you get those?

A. By an exact measurement made with a steel tape on the boat itself.

Q. On the boat itself? A. Yes.

Q. That was made by whom?

A. By myself, assisted by Mr. Hall, and the captain of the boat.

Q. Is there yet remaining on the Sacramento side this bridge head that you have indicated here in detail—is there anything left on the Sacramento side to show that?

A. Yes; the piles are probably all in position; some of them are broken off, and two or three are buried underneath the surface, but they are still in evidence at his surface line ten of those piles.

(Testimony of James C. Boyd.)

Q. What are the sizes and general characteristics of those piles?

A. They are square timbers, 14 by 14 making up the general line of the pier, while they are 8 by 14 at the most easterly end. [39]

Q. Does the line as you have projected it here run as it is projected all the way through from this bridge-head on the easterly shore or Sacramento shore westerly through to the center of the pier-head that yon have depicted on the Yolo or western shore?

A. It does. The line I have shown is an exact location relatively of the objects shown on that map with the exception that the "Thor" is projected from the Government map as indicated.

Q. Take the distance between the pier-head next to the Yolo shore and the first cluster of piles which you find easterly from that, along the line of the 1878 bridge, how does that distance conform with the distance between the group of piles which was the easterly end of the draw-span and the group of piles which you found in the river and indicated as having been through the bottom of the "Thor"?

A. Duplicating the same measurements on the easterly side of the pier near the protection pier, the remains of which are still there, the 143-foot span as indicated on the left, duplicated in that manner, would strike within two or three feet of the position indicated on the body of the boat from actual measurements made on the boat itself.

Mr. FORD.—It may enlighten both of us to ask, were those measurements made of those holes in the

(Testimony of James C. Boyd.)

"Thor" while the boat was still there in the river or subsequently? A. Subsequently.

The COURT.—That is supposed to have been the location of the dredge at the time of the accident?

Mr. HALL.—Yes.

Mr. FORD.—What I was asking was, whether this survey made by Mr. Boyd was at a subsequent time or right at the time, so far as the "Thor" itself is concerned.

Mr. HALL.—I will have to piece that together by the location of the "Thor" in the river and the measurement which he has now given. [40]

Q. Now, you spoke of the piles on the westerly side of the protection dam or wing protection of the present 1910 bridge. Have you seen those piles projecting out of the water recently? A. I did.

Q. Did you have any photographs taken of those piles? A. I did.

Q. When were they taken?

A. I think I have marked them there; August 14, 1919, at 4 P. M.

Q. I hand you a document—

The COURT.—What was the date of the accident?

Mr. HALL.—The date of the accident was July 13, 1918, and these were taken this summer at the stage of low water.

Q. You will notice at the bottom of the crib there, as we will call it, of the present bridge, there are a number of piles projecting out of the water. Are those the piles which you have depicted on the blueprint A? A. They are.

(Testimony of James C. Boyd.)

The COURT.—Where are the piles?

A. They are shown here.

Mr. HALL.—Q. Is that a fair protographic representation of the conditions as they existed at the time that photograph was taken?

A. Yes; the tidal action was not extremely low-water mark, but it was at a period between high water —there is a tide at Sacramento—between high water and low water giving us an indication of the shape and condition of the piles.

Mr. HALL.—We desire to offer that in evidence.

(The photograph is marked Libelant's Exhibit 3.)

Q. I present to you another photograph. Will you explain that?

A. The pier which is shown on this blue-print on the left, and of which the enlarged drawing is shown on the upper left-hand corner, is depicted on this photograph, on the lower left-hand corner, showing the square timbers forming the lower [41] part of the end of the pier; that is the photograph was taken from here showing these timbers and these timbers in here; then the piles and rock work that is shown here is United States Government wing dam extending out toward mid-stream, with sand shown on either side of it.

Mr. HALL.—We offer that in evidence as Libelant's Exhibit 4.

(The photograph is marked Libelant's Exhibit 4.)

The COURT.—The piling referred to there is that on the bank in that picture? A. Yes.

Mr. HALL.—This is on the Yolo County bank.

(Testimony of James C. Boyd.)

A. This is looking toward Sacramento on the Yolo County side. The next one was taken, which will be Exhibit 5, from nearly the same position but shows that pier in a little longer form, showing the extent of the central part and the various ends here, the two end pieces, and the broken up planking which forms the easterly side of that pier; the wing dam is shown on the lower right-hand corner, just the end of it; these piles which are shown in the middle foreground are protection piles which extend down stream from this pier, and there are a number of them extending down about 30 or 40 feet.

Mr. HALL.—We offer that in evidence as Libelant's Exhibit 5.

(The document is marked Libelant's Exhibit 5.)

Q. I call your attention now to another photograph of the piles taken near the protection wing of the 1910 bridge.

A. This is a photograph of the same cluster of piles which was taken from a boat immediately in front of it.

Mr. HALL.—We offer that in evidence as Libelant's Exhibit 6.

(The photograph is marked Libelant's Exhibit 6.)

Q. What is the photograph I now hand you? [42]

A. In the left-hand foreground is a man standing with a rod, and at that point are six piles, square timbers, which cannot be seen on account of a pile in front of it, but the location there on the levee shore is the location of the pier at the extreme easterly end of the 1878 bridge.

(Testimony of James C. Boyd.)

Q. The Sacramento end of the bridge?

A. On the Sacramento side, but on the right, the other side of that—

Mr. HALL.—I offer that in evidence as Libelant's Exhibit 7.

(The document is marked Libelant's Exhibit 7.)

Q. Were you present when the photographs were taken of the "Thor" when she was down on the piles?

A. I was not.

Q. You did not see her there yourself? A. No.

Q. Did you see her?

A. I did see her frequently.

Q. You did see her when she was down on the piles?

A. Yes.

Q. I hand you eleven photographs and ask you to tell the Court whether or not from your knowledge of the situation there in July 1918, those fairly depict the conditions as they existed on the ground and in the river?

A. As seen from the railroad bridge over which I had occasion to go on the trains on numerous occasions while the boat was there, I am satisfied they are a true representation of the condition and position of the boat at that time.

Mr. HALL.—We offer these photographs in evidence as Libelant's Exhibit.

(The photographs are marked Libelant's Exhibit 8.)

Q. You have on the board also Mr. Boyd a white plat. Will you tell us what that is?

A. The white print or blue-line print shown on

(Testimony of James C. Boyd.)

the board and marked 2B is from a tracing which I made of the photographic copy of the map on file in Washington, and in addition to the copy of the photographic copy I have projected the line of the existing bridge and shown that, to distinguish it from the other lines, in a shaded red, and on that the figures indicate the position made [43] from the survey with reference to Second and I Streets, and also the town of Washington, or Broderick at Second and Ann Street, having projected the line of the existing bridge to those points; they were fixed points on that photographic map, and in order to locate the bridge, the existing bridge on that map I made the survey, and from that survey showed these lines in addition to the lines copied from the photograph, so that we have here three bridges in evidence; that is on the map, one marked 1878 on the upper side, and on that is marked existing bridge; underneath that is the red-shaded bridge marked 1909, and below that the bridge marked 1895. The year is approximately the year of the construction of each of the several bridges indicated; but on the lower left-hand side it is marked copy of the photographic map of original on file at Washington, D. C., scale 100 feet to an inch, and marked February 19, 1895; so that at the time that this map was filed at Washington the lower bridge was a proposed bridge at that date; and the upper bridge is marked existing bridge; so that this bridge built in 1878 was then an existing bridge and they proposed to build a bridge on the lower side marked the 1895 bridge.

Mr. FORD.—I don't know how much of this is

(Testimony of James C. Boyd.)

going to be hearsay, and how much direct evidence; I assumed this gentleman was simply marking this for some purpose of illustration, but apparently now we are getting in some direct evidence here about the 1878 bridge, and I take it that this gentleman does not remember that far back.

Mr. HALL.—If you will allow him to explain—

Mr. FORD.—You are explaining too much.

Mr. HALL.—This is merely a graphic compilation of what is already in evidence, namely, certified copies from the War Department.

Mr. FORD.—If that is what they are, and you are not having him recite these matters to get them into the record, [44] I have no objection.

Mr. HALL.—It is simply a compilation gathered together from matters which are already in evidence.

Q. The pink bridge on here is what we have referred to as the 1910 or existing bridge now?

A. Yes.

Mr. HALL.—That is all.

Cross-examination.

Mr. FORD.—Q. Mr. Boyd, you stated that this, referring to the blue-print, showed the general location; that is your examination of the ground conformed generally to locations shown by the War Department. Did you mean with reference to this matter—what did you refer to when you said the general location?

A. As to its position, for instance, on the eastern end of the Pioneer Mills.

(Testimony of James C. Boyd.)

Q. What was there there that caused you to use the word "general" rather than saying exactly?

A. The exact details of the spans of that bridge I do not know. I simply took the measurements that I found on the ground here, and applying this pier construction to this construction, a right angle line from the left-hand pier would strike through the center of this cluster, and projecting that same line through here strikes through the center of the central cluster, and projecting that line still further it would strike through the center between the extreme easterly pier-heads.

Q. Was there any way from these plans in the War Department by which you could determine that this line does conform, the line that you have here, does conform to the same situation, with reference to the War Department plans?

A. As shown on the photographic map; yes. It shows its position with reference to the Pioneer Mills.

Q. Let us not get at cross-purposes. You took certain physical evidence there on the ground or in the water, whichever you may call it?

A. Yes. [45]

Q. This piling that you found, the pier-heads, whatever you call them, and you made this line here to correspond with the center line or some line that you found on the ground. Now, when you took the War Department plans of this 1878 bridge, was there anything about that plan that would fix this center line on the ground?

(Testimony of James C. Boyd.)

A. Yes, this plan here.

Mr. HALL.—That is the plan marked 2B?

A. Yes.

Mr. FORD.—I may still be a little confused.

The COURT.—What is there in that plan that indicates the bridge is in the same place?

A. The Pioneer Mills and the Pioneer Wharf; its position on the upper line is exactly the same as it has been since 1858 or 1860.

Q. The Government plan refers to this?

A. These objects are exactly as they have always been.

Mr. FORD.—Q. It goes a certain distance from the mark there?

A. One limit, the position of Second and I Street, is a known factor; the position of Ann, Harriet and Second Street of the town of Washington is also shown on the application for a permit made in 1895.

The COURT.—Q. And the permit likewise locates the place with reference to those points?

A. It does, so far as these bridges here are concerned.

Mr. FORD.—Does it locate it with reference to Ann Street, or with reference to any particular object that is on the ground there now?

A. This is an exact copy of that photographic map with the exception that the red line should be taken out.

Q. This Exhibit 2B was a plan of the 1909 bridge, was it?

(Testimony of James C. Boyd.)

A. No, a plan of the 1895 bridge showing on it the position of the existing bridge, which was built in 1878, and which was existing in 1895 as depicted there on the blue-print. [46]

Q. So that you have them fixed accurately upon both diagrams the location of the 1878 bridge?

A. Absolutely.

Q. On the ground there what did you find with reference to any other piling or pier-heads in the same locality as the 1878 bridge?

A. The United States Government wing dam is in evidence there and also a number of protection piles below.

Q. Did you find any other pier-heads of previously existing bridges?

A. I did, over on the Sacramento side.

Q. Where?

A. I think that is the 1858 and 1859 bridge; it is indicated in two clusters you will notice below the 1878 bridge.

Q. What did you find on the upper side with reference to the same matter?

A. That is all covered with sand.

Q. You had not examined it then recently?

A. Yes, I have examined it recently; it has a sand-fill over there; that does not apply on the Sacramento side.

Q. I thought that had been dug out recently.

A. No, not on the shore line; a Government wing dam has been put in there for the purpose of filling there, and it has served the purpose of accomplish-

(Testimony of James C. Boyd.)

ing what it was put for there at the time.

Q. Didn't you find the pier-heads on both the east and west sides exposed? A. On the west side—

Q. That is, taking the 1858 bridge as well as the 1879 bridge, that you have referred to, didn't you find the piling or the evidence there of old 1858 bridge on both sides?

A. No. The position of the west end of that bridge is now covered with a levee, undoubtedly covered by a levee, built up by dredges.

Q. I notice here on this "Thor," the place where the "Thor" is located on clusters of piles at various places, there is a cluster of piles toward the upper part of the diagram consisting of a number of piles? A. Twelve, I believe. [47]

Q. And then above that a cluster of three?

A. Yes.

Q. Off toward the Sacramento side?

A. The Sacramento side.

Q. And another cluster of three and right at the edge of the diagram of the "Thor" another cluster of three, down near the center line of this 1878 bridge, as you call it, another cluster of three piles and to the lower part a cluster of three piles. What do these other marks here represent?

A. The crosses indicate broken planking in the bottom of the boat.

Q. What is this?

A. I think that is just a blot on there.

Q. That is the only place where you find piling or holes in the "Thor" which you have marked as

(Testimony of James C. Boyd.)

piling, are the ones indicated by the little circular lines?

A. Those are the points that were indicated to me by the captain of the boat at the time that I made the examination of the boat itself.

Q. Did you in your examination of the ground there at the time these photographs were taken, or about the time you made the examination, during low water—were any of these piling exposed or had they been removed?

A. There was nothing in evidence of their location at the time.

Q. The piling, however, on both sides is still in evidence there. I wish to qualify that; they are in evidence only at low water; at the time the photograph was taken, it had to be done at low water, in the midst of summer; to-day, on account of the rise of the river these piles would all be submerged and not visible.

Q. Are you sure of that?

A. The piles which we photographed are not visible now.

Q. The piles at the side are visible yet, are they not? A. These are in evidence.

Q. You don't know what the river is to-day?

A. Yes, there are about 4 to 6 feet I presume in the river now.

Q. Then the river at the present time is, until the last two or three years, where it usually stood at low water? [48]

A. About two feet is extreme low water; it has

(Testimony of James C. Boyd.)

got down to as low as zero.

Q. When? A. '54, '56, and '57.

Q. Let us speak during your existence.

A. I have the record here.

Q. Yes, that will be produced, but referring to the time as long as you can remember,—you have lived in Sacramento about 30 years?

A. Yes, a little over.

Q. When during the time as long as you can remember did the water ever get down to zero except in 1918?

A. I don't think it did then; very low water, I think, was this year when it got down to about 2.2.

Q. Now, in 1918, what was it? A. 1.8.

Q. In 1918?

A. That was the summer of that year.

Q. Do you mean it got down to that in the summer of this year?

A. The summer of this year, 1918.

Q. Didn't it also in 1919 get down?

A. Here is a hydrograph record.

Q. In 1918 it went down to very low water also, didn't it? A. Yes.

Q. What was the lowest mark in 1918, if you know—by the way, might I inquire how you know about these low-water marks? Do you keep these records yourself? A. I do.

Q. That is a part of your business?

A. That is part of my business, yes.

Q. There in Sacramento?

A. I am dealing with reclamation work all the

(Testimony of James C. Boyd.)

time. The water surface on July 13, 1918, was 4.92 by the United States Engineering Department datum.

Q. What does that 4.92 mean?

A. That means considered with reference to the gauge at Sacramento; the relative difference would be 3.12 taken with 4.92; that is 1.8 of the gauge reading at Sacramento City, which is the gauge reading of the United States Geological Survey. [49]

Q. That is on July 13th, 1.8? A. Yes.

Q. That was the water level at that time was it?

A. Yes, at 11 o'clock that night.

Q. At 11 o'clock that night, 1.8? A. Yes.

Q. How did that compare with the low water say for 32 years, or whatever it is, that you remember back from that?

A. That I remember.

Q. Yes.

A. I think it is the lowest water I ever recall.

Q. Was it not remarkably low in July, 1918?

Mr. HALL.—May I interpose an objection to that? It is utterly immaterial, irrelevant and incompetent as to the stage the water was at for the reason that there was sufficient water in the river for navigation, and that the stage of the water cannot affect the question here.

The COURT.—It is competent testimony with reference to this piling and so on; whatever effect it may ultimately have; he may answer.

A. The word "remarkable" means, I presume,

(Testimony of James C. Boyd.)

a period of 12 hours or 24 hours; as an average all summer it was noticeably low.

Mr. FORD.—I don't know whether I express myself properly, I am not acquainted with the water at Sacramento, but I was acquainted with the water at the same period in Colusa; I was up there and the water was remarkably low, so much that it was noticeable to a person who was not acquainted with the river. Now, does the same situation exist at Sacramento?

A. Yes, it did, but shall I explain the situation?

Q. Certainly.

A. By reason of the fact that irrigation is so pronounced in the last few years, getting more and more every year, the water flow of the Sacramento River is getting extremely low, and dangerously low, so much so that the State Department has taken on itself to make an investigation for [50] the past two years to conserve that water, so as to provide for a flow in the Sacramento River during the extremely low-water stage in order to make navigation proper; these conditions are getting more acute. Captain Jackson reported, however, by reason of the United States Government work on the Sacramento River, by the introduction of the wing dam for the conservation of the water, the prevention of the overflow, and by keeping the water retained within the levees they are thereby scouring out the bed of the stream; while the water itself may be lower there may be more draft or vessels of deeper draft may still be able to ply

(Testimony of James C. Boyd.)

in the river; on numerous occasions I have had to get off at Y Street, because the boat could not get any further up. That hasn't occurred in a period of 10 or 15 years, that vessels could not reach Sacramento. The bed of the river has gone down, it is reaching more nearly the 52 or 54 basis.

Q. And the Government is continuously dredging out, is it not? A. Yes, that is true.

Q. Addressing myself again to the question I asked you before, in 1918 when they were taking water out of Colusa and Glenn County in such large quantities, the river did reach an extremely low stage along in July? A. It did.

Q. For the first time since you can remember?

A. I think so.

Q. And taking your own recollection, about how many feet lower would you say than ordinarily it had reached any previous year during your recollection?

A. Four feet would be an ordinary low water.

Q. Do you remember any years when it got down to four feet? A. Yes.

Q. That is within the last few years?

A. Three feet is not an unusual low water.

Q. Up to 1912 it had never gotten down to 3 feet, according to your recollection, had it?

A. I could not say offhand, without looking at the records. [51]

Q. You may refer to your records if you have it.

A. I do not recall it.

(Testimony of James C. Boyd.)

Q. You said you had taken these records and had them with you?

A. I have records, but I would have to search the records.

Q. We will show that from other sources. Where was the "Thor" when you made this survey by which you located these holes in the bottom of the boat? A. The San Joaquin River.

The COURT.—Q. It was made a year or so after the accident, I understand?

A. Yes, about a year.

Mr. FORD.—Q. Were the holes still there?

A. No.

Mr. FORD.—I had understood, while the boat had been moved away somewhere, it was not at that place, that these holes were actually in evidence when he made the survey.

A. They were pointed out to me as I stated by the captain of the boat.

Q. You have no personal knowledge then as to whether the bottom of the "Thor" was pierced?

A. No, I have not.

Q. Mr. Boyd, during this period that you have been observing the river you say that the bottom of the river has been gradually lowered? A. Yes.

Q. So that while the water reaches a stage maybe 5 or 6 feet lower than it formerly did, the depth for vessels is probably as much as it was in former years, during low water?

A. No, I do not think the water has ever got down to as low as it was in '52 and '54.

(Testimony of James C. Boyd.)

Q. So that there will be no misunderstanding about his, when you were giving this little lecture a little while ago—

A. I beg your pardon, I did not intend to be.

Q. (Contg.) Or whatever you call it, as I understood you, during the time you had been observing this record, that originally while, we will say, the water may have been as high as, say, 6 feet at low-water mark, or what it might be at low-water mark this year or last year, that during that period however the bottom of the river had been lowered?

A. It had. [52]

Q. So that while low-water mark would be, say, five or six feet lower than it originally was, if you measured from that low-water mark to the bottom of the river, you might get as much depth of water as you did in previous years w hen the river was 5 or 6 feet higher; is that the idea?

A. No; the general average would be an average lowering of depth about a foot.

Q. It has not been lowered to anything like the difference between what was formerly low-water mark and what it is these last few years?

A. Ordinarily low-water mark would be three or four feet, and the extreme low water of last year was 1.8.

Q. May I inquire how you get the former low-water mark of 3 or 4 feet? Up to recent years there was never such any low-water mark as that, was there? It is my recollection that 5 or 6 feet

(Testimony of James C. Boyd.)

was low-water mark up to the time they started this irrigation.

A. As to the previous years I could get the records for you.

Mr. HALL.—Let him produce the records.

Mr. FORD.—Q. You have the records?

A. Yes, can I submit them later?

A. Yes, certainly; I have them here but I cannot vouch for the correctness of them. I am perfectly willing to let the witness see them.

The COURT.—Where was that taken from?

Mr. FORD.—I don't know.

Mr. HALL.—The witness has the tables here.

The COURT.—If you have it there offer it in evidence. Does it require any explanation?

Mr. FORD.—Except that we may have to explain how we got it; it is not certified. Counsel may concede it is correct.

Mr. HALL.—It is signed by Mr. Taylor, is it not? [53]

Mr. FORD.—Is that his signature?

Mr. HALL.—I think that is correct. Subject to correction it may go in.

The COURT.—It will be admitted in evidence, then.

Mr. FORD.—Your Honor, this is Mr. Taylor's water bureau record, commencing in 1880 and down to this year, 1919, it covers a period of 39 years, and that goes a little back of what this gentleman remembers; the lowest water mark I find on here down to 1912, which was the lowest year, that is

(Testimony of James C. Boyd.)

the first time it started dropping was 4.1 feet; before that it ran from 5 to 7 or 8 feet low-water mark; then it begins to drop down from 1912 on until finally 1918 it reached .9 of a foot low-water mark and in 1919 .7 of a foot. Do you want to look at that, Mr. Boyd?

A. The whole thing is geographically depicted on this diagram which I have here and which is a report on the partial source of water supply of the City of Sacramento.

The COURT.—The other has been admitted in evidence by consent and it is not necessary to verify the statement further.

(The document was marked Defendants' Exhibit "A.")

Mr. FORD.—Q. As I understand you, then, under present conditions, and I refer to 1918 as compared with 1895—under the conditions in 1918 as compared with the conditions in 1895 and 1896, that is 1918 being the time when this boat was wrecked and 1895 and 1896, the time when this 1878 bridge was torn out, there was a difference of some 8 feet in the low-water stage of the river, was there not? A. No.

Q. What was it?

A. The difference between 1895—

Q. (Intg.) 1895 was when the 1878 bridge was torn out, was it not?

Mr. HALL.—February, 1896.

A. 1895 and 1896, the low marks, the first one, at elevation about 8— [54]

(Testimony of James C. Boyd.)

Q. I have 8.3 in 1895. A. Yes.

Q. And 8.5 in 1896.

The COURT.—You have both the same figures?

A. 1918, I have not got it, but you have it before you.

Mr. FORD.—.9 in 1918, and .7 in 1919.

Q. You mentioned, Mr. Boyd, that during this period that you have been observing the river that the channel has changed somewhat, with reference to Sacramento and Washington. You said something about in the locality of Sacramento and Washington the center of the stream or the bed was changing, did you not?

A. Yes, the bed of the stream is constantly changing.

Q. What change was there between 1895 and 1896 when this 1878 bridge was removed and 1918, if any?

A. The Government wing dam was constructed.

Q. On the Washington or Sacramento side?

A. On the Washington side, which threw the current over to the Sacramento side.

Q. What did that do so far as the bed of the river on the Sacramento side was concerned?

A. It tended to erode it or scour it out and carry the sand further down.

Q. Have you any personal knowledge as to what it actually did?

A. It did that in several places.

Q. Do you know to what extent it lowered the bed of the stream on the Sacramento side?

(Testimony of James C. Boyd.)

A. It could not be determined on account of the conditions adjacent to the piers; you might have 25 feet immediately adjacent to the pier and 12 or 13 feet in midstream or between piers.

Q. However, as I understand you, the jetties—is that the term? A. The piers.

Q. In throwing the water to the Sacramento side it deepened the stream on that side?

A. Oh, yes. [55]

Mr. FORD.—With reference to the matters that this witness has testified to which would be purely hearsayI want to make sure that I do not get myself in a position where I will not be able to have it stricken out in case it is not connected up.

The COURT.—Where he has testified to matters of record, of course his testimony will be disregarded, unless it is supported by the record.

Mr. HALL.—You have particularly in mind these measurements?

Mr. FORD.—And the various Government diagrams that the witness has testified from.

Mr. HALL.—Those diagrams are in evidence; I offered them.

Mr. FORD.—When I examine them probably my anxiety will be relieved.

Q. You referred, Mr. Boyd, all the time during your examination, and Mr. Hall in his questions to the 1878 bridge. Do I understand that from your examination there was a new bridge put in there in 1878? A. Yes.

Q. By the company you mentioned? A. Yes.

(Testimony of James C. Boyd.)

Q. Do you know anything about the location of that 1878 bridge, as to whether it was at the same location as the previous bridge?

A. The 1878 bridge?

Q. I might as well clear it right up here. I notice rather a remarkable coincidence here in your testimony and the statement of Mr. Hall, but no mention is made of the 1867 bridge.

A. The 1869 bridge was a conversion of the 1858 bridge to a railroad bridge, in 1869, as I have it.

Q. You are mistaken.

A. In 1858 there were no railroads in Sacramento.

Mr. FORD.—Mr. Hall and the witness both referred only to this 1878 bridge and Mr. Hall's own statement indicated there was an 1858 bridge which the witness has fairly located on here by this piling just alongside here—

The COURT.—Further downstream. [56]

Mr. FORD.—Further downstream that is right adjoining—

Mr. HALL.—I have a witness who built the 1878 bridge, and I will clear that up.

Mr. FORD.—I was wanting to clear it up as much as I could from this witness.

The COURT.—I understand this witness has no personal knowledge of the location of these earlier bridges.

Mr. FORD.—Of course he has no knowledge of the 1878 bridge, that is by seeing it built, have you?

A. I went over that bridge frequently.

(Testimony of James C. Boyd.)

Q. So did I, but not in 1878. That is all.

Redirect Examination.

Mr. HALL.—Q. Mr. Boyd, just one question. The piles which you have marked on the "Thor" on Exhibit 2A were placed by you from the actual measurements on this plat taken by you on the hull of the "Thor"? A. Yes.

Q. At positions shown you by Mr. Johnson while you were together on the "Thor"? A. Yes.

Q. And you used in making this diagram the actual measurements of the "Thor" itself that you took?

A. Yes; I took these measurements and all of this in connection with the "Thor" on the boat itself assisted by Mr. Johnson and Mr. Hall.

Q. There has been more actual water for navigation in the river at Sacramento in the last few years than there has been in previous years, has there not? While the actual level of the surface of the water is lower, there has been more feet of water below the level for navigation than in previous years, has there not?

Mr. FORD.—Before he answers that, I do not like to object to the question, but it is leading and suggestive.

The COURT.—I think the witness has fully explained that matter, but he may answer.

A. I think the actual cubic feet per second running by Sacramento [57] would be normal notwithstanding the lower condition or the stage of the water.

(Testimony of James C. Boyd.)

The COURT.—The question is the depth of water for navigation purposes rather than the quantity.

Mr. FORD.—He spoke about the number of cubic feet. May I have the answer read?

Mr. HALL.—I am getting at the actual depth of the water.

The COURT.—It was not responsive.

Mr. FORD.—I take it that it was because it is our view of the matter that the fact that the general body of water flowing down there had greatly decreased becomes quite an important element in the determination of this matter.

The COURT.—His answer was not responsive to the question at all.

Mr. HALL.—I want to get my question answered. There are more feet of water from the surface of the water down to the bed of the stream for the purposes of navigation now than there was in years gone by?

Mr. FORD.—Just a moment. That is objected to on the ground it has been asked and answered, and upon the ground it is leading and suggestive, the witness having answered before that there is not as much depth of water, because the depth of the bed of the stream has been lowered about a foot on the average as I remember it.

The COURT.—That is my understanding. The question is leading of course, but he can state what the fact is.

A. Evidently I have not made myself clear, but frequently I have been stopped at Y Street and

(Testimony of James C. Boyd.)

could not reach Sacramento at all.

Q. Answer the question directly. Is there or not a greater depth of water there than formerly? [58]

A. There is a greater depth of water now than there has been for a great many years.

Q. There is a greater depth of water in the channel? A. In the channel.

Recross-examination.

Mr. FORD.—Q. What about the quantity of water flowing down the channel in 1918 as compared with, say, 1895 or 1896?

A. During the summer?

Q. During low-water stages.

A. Possibly a smaller quantity, to a limited extent.

Q. Didn't you answer the Court a few moments ago that these large irrigation projects were taking out a great quantity of water, and had a tendency to lower the stream?

A. They have.

Q. Then the fact is that there is a considerably less quantity of water flowing down during low water, is there not?

A. All depending on the season of the year, or the condition of the supply which feeds the river.

Q. These large irrigation projects have only been running at full blast the last two years?

A. Yes, two or three.

(Testimony of A. A. McKeon.)

Q. The Colusa and Glenn rice matters have only been at their height two or three years?

A. Yes, since the rice became a factor.

Testimony of A. A. McKeon, for Libelant.

A. A. McKEON, called for the libelant, sworn.

Mr. HALL.—Q. Mr. McKeon, where do you reside? A. In Saratoga, at Odd Fellows Home.

Q. How old are you?

A. I was born on the 5th of August, 1848.

Q. What has been your occupation?

A. I worked 30-odd years for the Southern Pacific Railroad Company as foreman—not as foreman the whole length of the time, but about 25 years of that time I was foreman for them.

Q. When did you commence to work for the Southern Pacific? [59] A. In 1869.

Q. Where were you first employed?

A. I was employed first at the Summit of the Sierra Nevada Mountains, at the station called Summit.

Q. Did you ever do any work on any bridges near Sacramento? A. I did.

Q. When did you first commence to do work on bridges for the Southern Pacific Company at Sacramento?

A. Well, we did a little repair work in 1869 there on some of the old bridges; I was then working as a carpenter in the gang; I was not foreman; I was just a carpenter in the gang under another man.

(Testimony of A. A. McKeon.)

Q. Where was the bridge located that you worked on in 1869?

A. Well, it was known then as the old California Pacific Railroad bridge.

Q. Where did it extend to, from what town to what town?

A. From the Yolo side to the Sacramento side.

Q. Was the bridge that you worked on in 1869 then being used as a railroad bridge? A. It was.

Q. By what railroad?

A. The California Pacific, as I understood.

Q. You were in the employment of what company at that time?

A. I was in the employ of the Central Pacific Railroad Company, working under the jurisdiction of Arthur Brown as superintendent of the Bridge and Building Department.

Q. What repairs did you make to the bridge at that time?

A. They were just minor repairs, just strengthening up the bridge a little bit.

Q. Did you work on the bridge from that time on?

A. I never worked on that bridge hardly any afterwards, except that we might be called there a day or so to do some little job when we were around in that vicinity. [60]

Q. Were you familiar and acquainted with that bridge, and the use to which it was put from that time on for a number of years?

A. Well, I was in a way; of course, I was not at

(Testimony of A. A. McKeon.)

Sacramento all the time; I was in the employ of the company all over the lines; sometimes I would be in Oakland, sometimes I would be all over the line, in different places.

Q. When you were about Sacramento and passing back and forth across the line, did you see the bridge in operation and in use? A. Yes.

Q. By what railroad company?

A. Well, I suppose by the Central Pacific Railroad Company, it was then called, before they merged into the Southern Pacific.

Mr. FORD.—You are asking the witness about some matters that will probably confuse him, because I do not think the Central Pacific ever merged with the Southern Pacific.

The COURT.—That part of the answer will be disregarded as hearsay. I think the records that you will produce will show the true situation.

Mr. FORD.—Yes; there is no use confusing the witness on that matter.

Mr. HALL.—Q. When was the last time that you worked on the bridge which you first worked on in 1869?

A. I do not exactly remember the date, but it was late in '69 some time.

Q. Do you remember of the erection of a new bridge near the site of this '69 bridge, or the bridge that you worked on in 1869?

A. Which bridge have you reference to, the 1878 bridge?

Q. The 1878 bridge.

(Testimony of A. A. McKeon.)

A. I do have a recollection of the erection of it.

Q. What did you have to do with the erection of that 1878 bridge?

A. Well, I was living in Oakland at the time, and we framed the bridge there in Oakland, in the framing-yard in Oakland; I was foreman then in the yard, or assistant foreman then in the yard and we framed the bridge and sent the framed [61] materials to Sacramento, and a man by the name of Comstock, Charles Comstock, had charge of the work and we were backward and forward to see that it was carried; of course, I was not there all the time, just backward and forward occasionally; we framed the bridge and shipped it up there, and he was there putting it in place.

Q. You were there at different times, you say?

A. Yes.

Q. While it was being put in place? A. Yes.

Q. Where was the 1878 bridge erected with reference to the bridge that you worked on in 1869?

A. The 1869 bridge was downstream a little bit from the 1878 bridge.

Q. Have you paid a recent visit to the scene up there? A. How is that?

Q. Have you been up to Sacramento recently?

A. I was up there about the 14th, I think it was, of last month.

Q. You were here with Mr. Boyd, were you not, looking over the situation?

A. Yes, and yourself.

Q. You have heard Mr. Boyd's testimony about

(Testimony of A. A. McKeon.)

the plat, the blue-print marked Exhibit 2A, have you? A. I listened to it.

Q. Did you see the bridge-head on the Yolo side of the river which is depicted here on this plat?

A. I did.

Q. Is that bridge-head one of the bridge-heads or pier-heads that was put in there in 1878 in the construction of that bridge?

Mr. FORD.—Just a moment before the witness answers; I realize going back that far a person may make an answer that may be rather embarrassing to us, and yet the witness might be mistaken. Will you read that question to me, please, Mr. Reporter?

(Last question repeated by the reporter.)

Mr. HALL.—Q. I am referring to the bridge-head on the Yolo County side of the blue-print marked Exhibit 2A. [62]

A. To the best of my knowledge it is.

Q. Did you visit the Sacramento side and see any evidences of the old 1878 bridge there?

A. I did.

Q. Where were they?

A. They were close to the edge of the river on the Sacramento side.

Q. Did you point those out to Mr. Boyd?

A. I did.

Q. For whom were you working at the time you framed and, in a way, supervised, the construction of this 1878 bridge?

A. Under Mr. Arthur Brown, who was then

(Testimony of A. A. McKeon.)

superintendent of the Bridge and Building Department.

The COURT.—Of what company?

A. It was considered the *the* Maintenance of Way Department.

Mr. HALL.—Q. But what railroad company?

A. The Southern Pacific—well, I don't know exactly whether the Central Pacific had merged into the Southern Pacific at that time or not; I forget exactly; it was either the Central or Southern Pacific.

Q. From whom did you get your pay, do you remember how your checks were drawn?

A. We were paid by the Contract and Finance Company,—F. S. Doty was our paymaster, the Secretary of the Contract and Finance Company, in San Francisco.

Q. Did you see the 1878 bridge after it was built and put in operation? A. I did.

Q. What company was using it, and what trains were passing back and forth over it?

A. The Central Pacific or Southern Pacific just as you may term it; we always used to call it the C. P.

Q. What became of the 1869 bridge, do you know?

A. I was not there—they tore it all down—I was not there at the time that it was torn down. I was there when the 1878 bridge was torn down.

Q. Now, tell me who you were working for when the 1878 bridge was torn down?

(Testimony of A. A. McKeon.)

A. I was working then under W. S. Palmer, as Resident Engineer of the Western Division, under Mr. Arthur Brown, Assistant Engineer of Maintenance of Way. [63]

Q. Of what railroad corporation?

A. Of the Southern Pacific Railroad.

The COURT.—Q. What year was that?

A. That was in 1895.

Mr. HALL.—Q. When did you commence to tear the old 1878 bridge down?

A. Just as soon as we had the 1895 bridge constructed.

Q. Can you tell me about the time?

A. Well, I forget exactly now; it was in the latter part of the year; I can't remember the date.

Mr. HALL.—May I refresh the witness' memory?

Mr. FORD.—Yes.

Mr. HALL.—Q. To refresh your memory, Mr. McKeon, was not the destruction of the 1878 bridge completed about the 25th or 26th of February, 1896?

The COURT.—I do not suppose the particular date has any materiality.

Mr. HALL.—No.

A. I can't remember the date exactly now, it is so long ago.

The COURT.—The later part of 1895 or early part of 1896?

A. Yes, that is about right, your Honor.

Mr. HALL.—Q. Did you superintend the de-

(Testimony of A. A. McKeon.)

struction of the old 1878 bridge, yourself?

A. I did not superintend the construction of it, I was there.

Q. I mean the destruction of it.

A. The destruction, yes.

Q. That was under your immediate supervision?

A. Yes.

Q. By whom were you directed to destroy or dismantle the 1878 bridge?

A. By W. S. Palmer, then Resident Engineer of the Southern Pacific Company.

Q. And it was under such instructions that you did dismantle and destroy that bridge?

A. Yes. Mr. Palmer is now President of the Northwestern Railroad Company, over across at Sausalito. [64]

Q. Referring now to the Yolo side of the stream, where with reference to the pier-head of the 1878 bridge did the old 1869 bridge commence?

A. Which pier-head have you reference to?

Q. I have reference to the pier-head which we found on the bank of the river, there.

A. Close down to the water's edge?

Q. Yes.

A. It was upstream a little from the old bridge.

The COURT.—About how far?

A. It was probably about five—I don't know—five or ten feet, or in that neighborhood.

Mr. HALL.—Q. Then the 1878 bridge, on the Sacramento side, was how far upstream, if at all, from the end of the old 1869 bridge?

(Testimony of A. A. McKeon.)

A. The 1879 bridge was built just far enough above to clear the old bridge, I don't remember how far.

The COURT.—Parallel with it, was it?

A. Parallel with it, yes.

Mr. HALL.—May I strengthen that out?

The COURT.—Yes.

Mr. HALL.—Q. Is it not a fact that the 1878 bridge, the end of it on the Sacramento side, was a little further upstream?

A. It might have been a little further up; my memory is not very good just now in regard to that, but I think it was a little further up, if my memory serves me right.

Q. Do you know what became of the material in the 1869 bridge when it was destroyed?

A. It was torn down and sold for old wood.

Mr. HALL.—That is all.

Cross-examination.

Mr. FORD.—Q. McKeon, you say with reference to this 1869 bridge and the 1878 bridge—you referred to the 1869 bridge and said you did some work on a bridge there in 1869.

A. I did some work.

Q. A bridge over which railroad trains operated from Yolo County in Sacramento County?

A. Yes.

Q. And later on you did this work that you mentioned on what we call the 1878 bridge?

A. Yes. [65]

Q. And the 1878 bridge was built upstream just

(Testimony of A. A. McKeon.)

a few feet from this 1869 bridge that carried trains?

A. Yes.

Q. This bridge that you spoke of as working on in 1869, did you see it built, or were you there when it was built?

A. I was there at the time when it was built—you mean the 1878 bridge?

A. No, the bridge of 1869.

A. The 1869 bridge, I was not there when it was built.

Q. The first time you saw the 1869 bridge it was there and trains were being operated over it?

A. Yes.

Q. You don't know anything about when it was built?

A. No, I do not. It was built before I came to California.

Q. But anyway, this bridge that you worked on there in 1869 and which carried trains from Yolo to Sacramento, and Sacramento to Yolo County, was situated right alongside of the bridge that was subsequently built there in 1878 that you had to do with—the 1878 bridge that you afterwards tore out under Mr. Palmer's directions? A. Yes.

Q. Remembering back as best you can, how far—you say the 1878 bridge was built upstream from this existing 1869 bridge—about how much of a space, if you remember, was left between the two bridges, if you have any remembrance of that?

A. There was very little space, just space enough for to get through between.

(Testimony of A. A. McKeon.)

Q. That is, the two bridges were built about as nearly in the same location as they could be?

A. Yes, parallel.

Q. And not to tear out the existing bridge until the other one was built?

A. That is correct, that is the way it was.

Q. Were you there, Mr. McKeon, at any time after the 1878 bridge was completed and while the 1869 bridge was being torn down?

A. I was not there during the construction of the 1869 bridge—I was back and forward, of course, looking over the bridges, and doing some minor repairs at different times. [66]

Q. What I was trying to get at is whether or not your recollection carries you back so as to say, after this 1878 bridge was completed and the trains were being operated over it, you remember seeing the other bridge being torn out?

A. You mean the first bridge across?

A. Yes.

A. No, I was not there after that, because our work called me away from there and I was not around there at all.

Q. So what became of that bridge that was just below the 1878 bridge, your knowledge does not serve you?

A. They tore it down and sold the material, the old material, for wood.

Q. But you did not see it torn down?

A. No—well, I saw portions of it torn down during the time I was there; there would be pieces of it left;

(Testimony of A. A. McKeon.)

when I would be back and forward over the line, I would look out there and see the old portions torn down, but I was not there to have charge of the work, or anything of that kind.

Q. Afterwards, though, when you were up there working on the 1878 bridge from time to time, you observed that this 1869 bridge had disappeared, did you?

A. Oh, yes, it disappeared; it disappeared shortly after the 1878 bridge was erected and in use; it was destroyed right after that, as soon as they could tear it down.

Q. In telling Mr. Hall that these pier-heads, or whatever you call them, here on the diagram were in the same location as what you had seen in that 1878 bridge, did you fix that from some measurements taken on the ground up there at Sacramento while you were there last month?

A. We took some measurements; Mr. Boyd had a steel tape there, and we took some measurements.

Q. Did you compare that with some recollection you had of measurements taken of these bridges back in 1878 when you were there?

A. Just compared it with recollection, I have no figures [67] or memorandum for that, just from memory.

Q. How were you able to say these bridges were built very close together?

A. Well, I know when one bridge is built up alongside of another that they are close together. I was there during the construction, and I could see.

(Testimony of A. A. McKeon.)

Mr. FORD.—Your Honor, I think I might shorten my examination of this witness if I could complete it after lunch. These matters are matters that I am not at all familiar with.

The COURT.—It seems to me to be pretty well covered already.

Mr. FORD.—It might be. These old timers are pretty scarce, and here is what I had in mind, I shall want Mr. McKeon to remain here, for possibly there might be something else I would want to show by him.

The COURT.—He will remain until he is excused.

Mr. FORD.—I think that is all, with the understanding that he will remain.

Redirect Examination.

Mr. HALL.—At what time in the year 1878 was it that you commenced the erection of the 1878 bridge?

A. It was in the fore part of the year; now I cannot remember exactly; we started to frame the bridge in the Oakland yard about the first of the year.

The COURT.—Is the exact date material at all?

Mr. HALL.—No, not exactly; it may fit in with some other record I have.

Q. Do you know how long it took to build it, approximately, about when it was completed?

A. About the latter part of the year.

Q. Now, when you were on the ground the other day and examined the pier-head on the Yolo County side and the old bridge-head over on the Sacramento side, did the timbers or did they not, that you found there, look like the timbers that you framed into the old 1878 bridge?

(Testimony of A. A. McKeon.)

A. Well, of course, the timbers [68] that we saw there were simply the old piling that was driven there for the piers, and they were round, and we drove round piles; of course, they resembled the material we used, and the kind of material that we put there.

Q. You say they did resemble the material you used?

The COURT.—A round pile does not indicate very much.

Mr. HALL.—That is all.

(A recess was here taken until two o'clock P. M.) [69]

AFTERNOON SESSION.

Mr. FORD.—May I recall the last witness for a few more questions?

The COURT.—Yes.

A. A. McKEON, recalled for further cross-examination.

Mr. FORD.—Q. Mr. McKeon, with reference to the matters that you testified to on direct examination, as I understood you you had charge of the destruction of this 1878 bridge, when that was torn out?

A. I had charge of the tearing out of the bridge.

Q. Now, with reference to the piling that supported that bridge, what, if anything, did you do concerning the piling?

A. We broke them off the best we could, sawed some of them off, and then Mr. Palmer sent a man over from the Government snag-boat to blow them up with dynamite; he gave him a letter to me, telling me

(Testimony of A. A. McKeon.)

to show the man where the piles were, as near as I possibly could, and he went down—we had a diver there *there,* he went down and placed the dynamite, by the side of the pile, or wherever he put it I could not say, and blowed them out, and the piles bobbed up and they broke off, and he traversed the ground all over and said after he got through that they were all broken off, according to the way he was directed.

Q. Did you break them all off down to or below the river bed?

A. As close—some broke below the river bed—there was none but what was down level with the river bed.

Mr. HALL.—I interpose an objection there; the witness has testified as to what the diver said; I move that that be stricken out as hearsay.

The COURT.—He cannot testify as to what occurred under water. [70]

Mr. HALL.—No, Mr. McKeon was not under the water.

Mr. FORD.—You were in charge of the work the man was doing?

A. I was in charge of the work.

Q. You say when these dynamite charges were put in, you saw the piles bob up?

A. Yes; I might not have seen all of them, but I saw a great many of them.

Q. You did not do any diving yourself?

A. No; I could not tell you how low down they were broken off, only took his word for it.

Q. What were your instructions to him?

A. My instructions were to give them all the help

(Testimony of A. A. McKeon.)

that was required, and that he would attend to using the dynamite down in the bottom.

Q. You say this was a Government man?

A. They told me he was; that is all I know, what they told me, that he was sent from the snag-boat, that Mr. Palmer or the officials got him, the railroad officials got him from the Government snag-boat, and sent him down there as a competent man to do the work.

Q. You don't know, I presume, of your own knowledge, whether the channel of the river changed after 1895 or 1896, or not, do you? A. No.

Q. That is something you have no knowledge about?

A. I have no knowledge about it.

Q. If, by reason of the Government putting a jetty in there, the stream turned over to the Sacramento side, and some of this piling which had been cut off down to or below the river-bed, was exposed, you know nothing about that?

A. I don't know anything about that.

Q. You do not happen to remember the name of the man who was there who went down below, do you?

A. No, I cannot remember the name.

Q. Did you keep the pay-rolls?

A. He got his pay—I sent in a memorandum of the time that I was there, to the office, and I don't know what pay he got, or anything of that kind.

Q. The reason I was inquiring was so I might find the name of [71] the man.

A. No, I don't remember. I think I just gave the

(Testimony of A. A. McKeon.)

number of days that the man was there.

Q. That is too far back for you to remember the name?

A. I can't remember the name, we had so many different men there.

Redirect Examination.

Mr. HALL.—Q. This man was not there as a Government official to cut these piles off?

A. It was not a Government official, that I know of; he was sent from the snag-boat, and I suppose he was working on the snag-boat.

Q. But he was working for the Southern Pacific in blowing up the piles?

Mr. FORD.—Wait a minute.

Mr. HALL.—For the company that you were working for? A. Yes.

Q. What company were you working for at that time?

A. We supposed the Southern Pacific, that is, in 1895.

Q. Did you have any measurements made of the piles, of what was left of the piles in the river after the dynamite was exploded and the piles bobbed up?

A. No.

Q. Was there anyone that made any measurements of those when they were dynamited, when you were there?

A. Not to my knowledge, no.

Recross-examination.

Mr. FORD.—Q. Mr. McKeon, what means, if any, did you have to determine whether or not, we will

(Testimony of A. A. McKeon.)

say for instance, there was a pile extending 8 feet above the river-bed—what means, if any, did you have to determine whether or not it was taken off down to the river-bed?

A. Only the diver's word for it.

Q. That was his business there?

A. That was his business there.

Q. Now, you did not, in taking off these piles that you are speaking of—you had only at that time to do with the one bridge, the bridge that you were removing there?

A. The new bridge was the 1895 bridge; I did not take that out. [72]

Q. I mean in the locality where you were taking out piles, where you destroyed thi 1878 bridge, you did not have anything to do with any previous bridges that had been in that locality?

A. Not at all; no.

Mr. FORD.—That is all.

Mr. HALL.—That is all.

Testimony of M. H. Comstock, for Libelant.

M. H. COMSTOCK, called for the libelant, sworn.

Mr. HALL.—Q. Mr. Comstock, were you ever at any time employed by any concern in erecting or destroying any bridges over the Sacramento River near the City of Sacramento?

A. In erecting, but not destroying.

Q. What bridge were you connected with the erection of? A. The erection of the 1878 bridge.

Q. The 1878 bridge? A. Yes.

(Testimony of M. H. Comstock.)

Q. In what capacity were you employed?

A. Carpenter

Q As a carpenter? A Yes.

Q Did you work upon the bridge, itself, as it was being put in place, or did you work upon the framing of the bridge in the West Oakland yards?

A. I worked upon the erection of the piers.

Q. The erection of the piers? A. Yes.

Q. By what concern were you employed in the erection of those piers?

A. Well, that was at that time called the Contract and Finance Company, or the Western Development Company, and afterwards called the P. I. Company.

Q. You were paid through checks by those companies? A. I was.

Q. By what line of railroad was this bridge used, if you know?

Mr. FORD.—I noticed the witness says he was employed by the Western Development Company, afterwards known as the P. I. Co., which I presume is the Pacific Improvement Company.

A. This was at first the Contract and Finance Company. [73]

Mr. FORD.—I do not understand the next question.

The COURT.—He wants to know what railroad company was using the bridge.

Mr. HALL.—Yes.

Mr. FORD.—I didn't think there was any dispute about that.

Mr. HALL.—Is there not?

(Testimony of M. H. Comstock.)

Mr. FORD.—The California Pacific Line, wasn't it?

Mr. HALL.—Yes, they ran over that—it was the California Pacific Line of railroad that ran over there at that time. It was controlled and operated after 1884 by the Southern Pacific.

Mr. FORD.—After 1886; I won't say 1884. The Southern Pacific had a lease at 1886.

Mr. HALL.—Yes, and they operated that line ever since and the physical property is still owned by the California Pacific Railroad Company.

Mr. FORD.—What physical property?

Mr. HALL.—I mean the line of railroad and the bridge which was destroyed in 1895.

Mr. FORD.—I think I won't stipulate to that until I check it up. There is no question but what the California Pacific operated trains over the Sacramento River there to Sacramento commencing in '69, and thereafter until it leased its property to the Southern Pacific Company in 1886.

The COURT.—And caused these bridges to be constructed, did it?

Mr. FORD.—Not this bridge, your Honor, because the first bridge over which the railroad trains were operated was not owned by the companies at all.

The COURT.—I mean the 1878 bridge.

Mr. FORD.—There is where the difficulty comes in, and very singularly, too, both the Government and this gentleman say the 1878 bridge, and yet from evidence in my possession, while I was not there and did not see it built, it is very evident that the 1878

(Testimony of M. H. Comstock.)

bridge that they speak of was a reconstruction, and no new bridge built. [74]

The COURT.—I was just trying to straighten the matter out.

Mr. FORD.—Your Honor sees the situation I am in. Now, Mr. Hall advises me there is no question of its being built, and yet from the data I have here there was no, what we call, 1878 bridge built, because it was simply a reconstruction of the bridge.

The COURT.—Proceed.

Mr. FORD.—Very well, your Honor.

Mr. HALL.—But whatever was built there in 1878 was built by the California Pacific and was used by it and the Southern Pacific; isn't that true?

Mr. FORD.—I will give you the best of my information, and there will be no mistake about it. In 1869, under date of October 2, 1869, there appears the following in the Sacramento paper: A bridge being built upon a franchise to the California Pacific Railroad Company which permitted them to build 400 feet above the present bridge, and you will find from your Government records that that bridge was never built; but as they desired a location near Broad street, they built under the franchise of the Sacramento Yolo Bridge Co., into whose hands the bridge will pass after its completion, when the present structure will be removed. That is the source of my information, the article out of the paper.

Mr. HALL.—You will find, Mr. Ford, also that the tax records show that the Sacramento and Yolo Bridge Co. paid taxes upon that bridge until 1878.

(Testimony of M. H. Comstock.)

Mr. FORD.—Yes.

The COURT.—If we cannot agree on anything, we had better proceed with the testimony.

Mr. HALL.—Q. In 1878 what did you build across the Sacramento River, a new bridge or reconstruct an old bridge?

A. We built a new bridge.

Q. Entirely new? A. Entirely new.

Q. When did you commence the construction of that bridge?

A. I was sent up there, I think it was September, when I went [75] there.

Q. What was the stage of construction when you went there in September?

A. They had the pile-driver and everything there for driving piling.

Q. Were you there while the piers were driven?

A. The piers were nearly all completed when I was injured on that bridge.

Q. Where was that with reference to any other bridge that was then across the Sacramento River, in September, 1878?

A. Just on the upstream side of the old bridge.

Q. What company was using the old bridge in September, 1878, when you went there?

A. It was the old California P.

Q. The old California Pacific? A. Yes.

Q. They were using that as a railroad bridge, were they? A. They were.

Q. Were you on the construction of the new bridge in 1878 until it was completed?